MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-7

THOMAS J. MCRAE,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A
WRIT OF CERTIORARI

COGGINS, FIRESTONE & HANNAN, P.A.

By Louis Firestone
362 Wayne Avenue, Suite 403
Silver Spring, Maryland 20910

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REFERENCE TO REPORTS OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The judgment of the Superior Court for the District of Columbia is not reported, nor printed. The opinion of the District of Columbia Court of Appeals is not reported, but it is appended herewith.

GROUNDS OF JURISDICTION

The District of Columbia Court of Appeals handed down its decision on February 28, 1974. On or about May 29, 1974 an Application for Extention of Time In Which to File Petition For A Writ of Certiorari was filed. The same was granted on May 31, 1974 extending the time for filing this Petition for Writ of Certiorari until July 28, 1974. Jurisdiction is conferred on this Court

by reason of 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether prosecutorial misconduct in the instant case at the trial level was such as to infect said trial with such fundamental unfairness as to amount to a denial of Petitioner's right to procedural due process of law, as guaranteed to Petitioner by the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION

United States Constitution, Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE AND FACTS

Petitioner Thomas J. McRae, was convicted on November 13, 1972, in the Superior Court of the District of Columbia after trial by jury of simple assault and carrying a pistol without a license, which offenses were alleged to have occurred on October 15, 1972. A Motion for New Trial was filed by petitioner on November 17, 1972, but was denied by the Court when petitioner was sentenced on December 11, 1972.

On the twenty-eighth of February, 1974, petitioner's conviction was affirmed by the District of Columbia Court of Appeals. A copy of that decision is appended hereto.

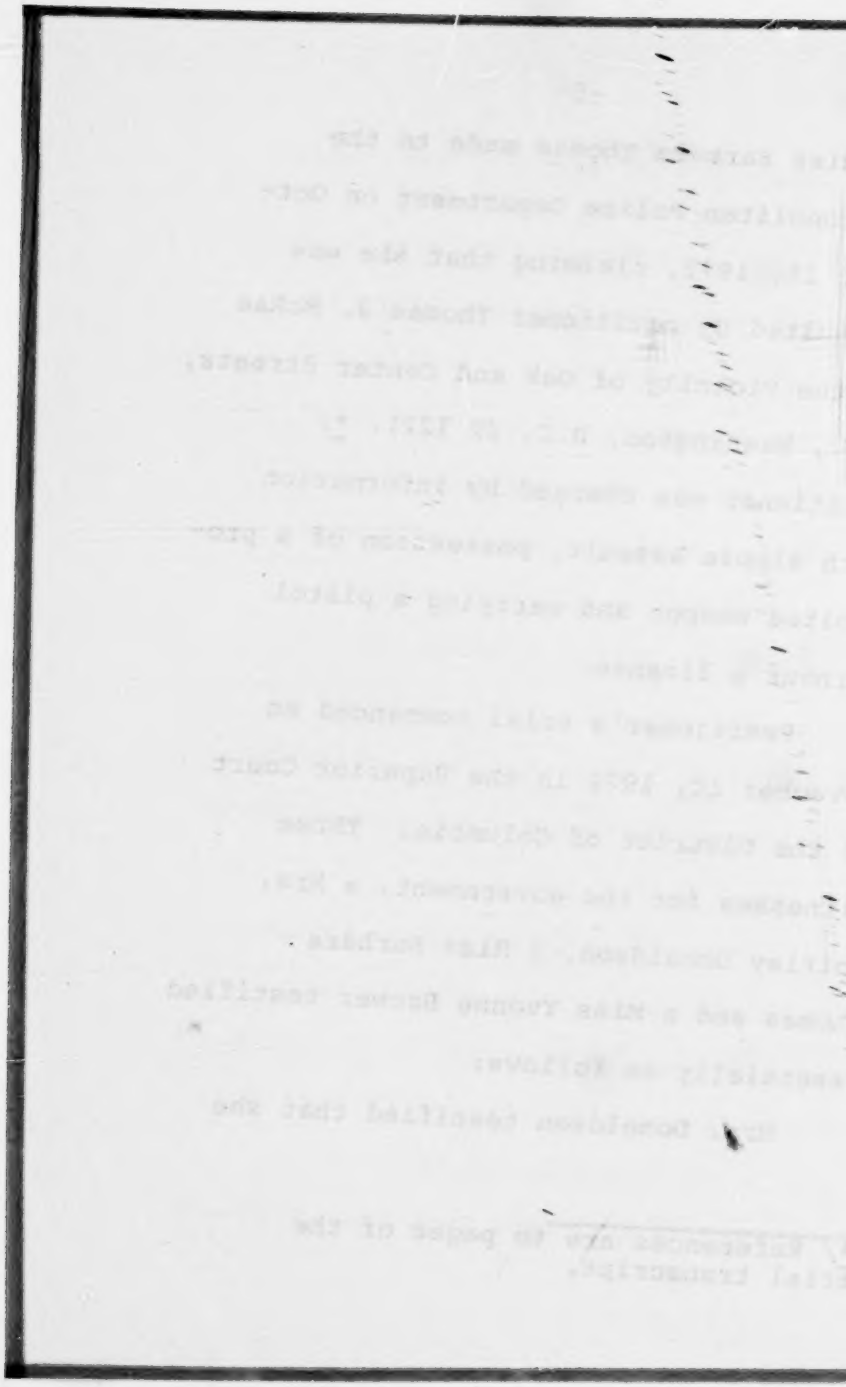
This case stems from the complaint

of Miss Barbara Thomas made to the Metropolitan Police Department on October 15, 1972, claiming that she was assaulted by petitioner Thomas J. McKee in the vicinity of Oak and Center Streets, N.W., Washington, D.C. (T 122). */ Petitioner was charged by information with simple assault, possession of a prohibited weapon and carrying a pistol without a license.

Petitioner's trial commenced on November 10, 1972 in the Superior Court of the District of Columbia. Three witnesses for the government, a Mrs. Shirley Donaldson, a Miss Barbara Thomas and a Miss Yvonne Brower testified essentially as follows:

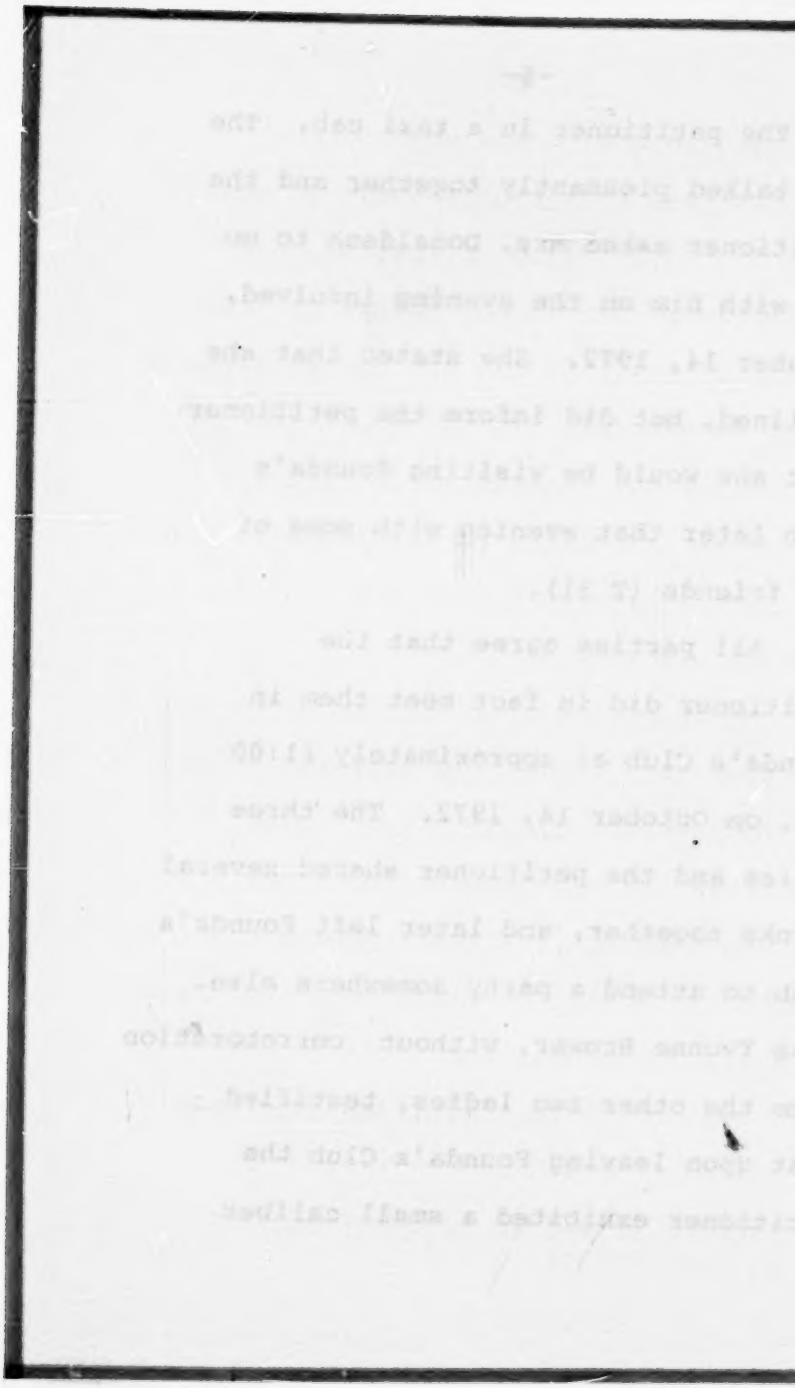
Mrs. Donaldson testified that she

*/ References are to pages of the trial transcript.



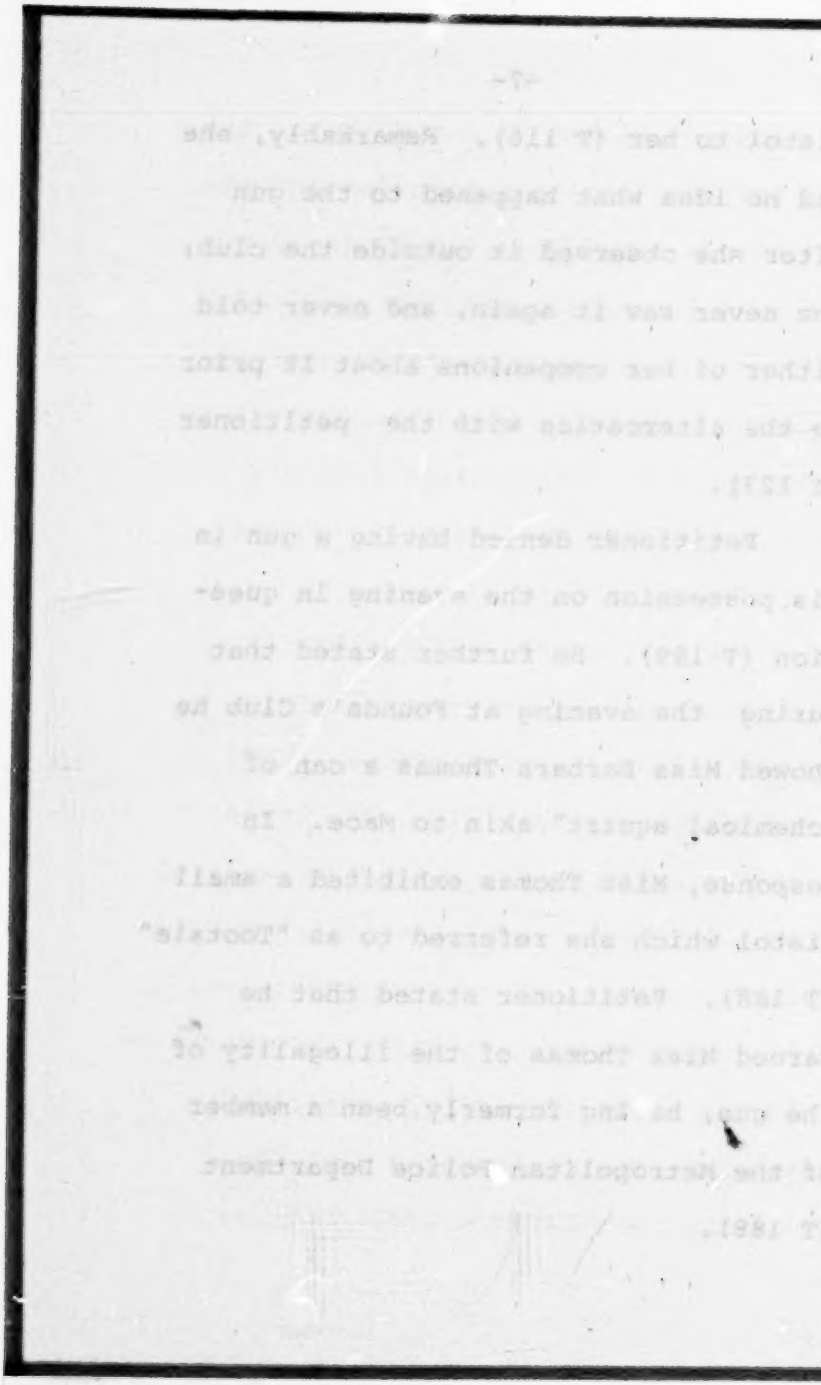
met the petitioner in a taxi cab. The two talked pleasantly together and the petitioner asked Mrs. Donaldson to go out with him on the evening involved, October 14, 1972. She stated that she declined, but did inform the petitioner that she would be visiting Founda's Club later that evening with some of her friends (T 31).

All parties agree that the petitioner did in fact meet them in Founda's Club at approximately 11:00 p.m. on October 14, 1972. The three ladies and the petitioner shared several drinks together, and later left Founda's Club to attend a party somewhere else. Miss Yvonne Brower, without corroboration from the other two ladies, testified that upon leaving Founda's Club the petitioner exhibited a small caliber



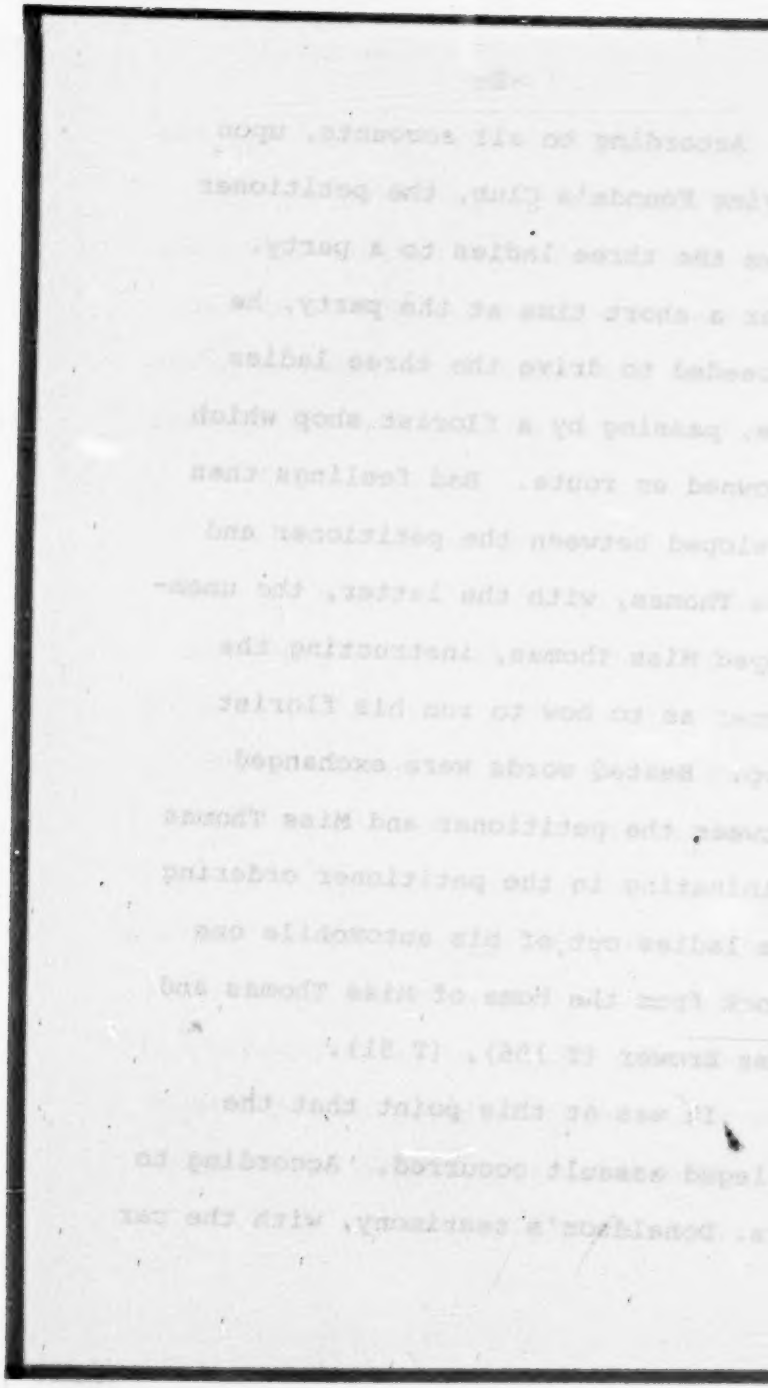
pistol to her (T 116). Remarkably, she had no idea what happened to the gun after she observed it outside the club; she never saw it again, and never told either of her companions about it prior to the altercation with the petitioner (T 123).

Petitioner denied having a gun in his possession on the evening in question (T 189). He further stated that during the evening at Founda's Club he showed Miss Barbara Thomas a can of "chemical squirt" akin to Mace. In response, Miss Thomas exhibited a small pistol which she referred to as "Tootsie" (T 188). Petitioner stated that he warned Miss Thomas of the illegality of the gun, having formerly been a member of the Metropolitan Police Department (T 188).



According to all accounts, upon leaving Founda's Club, the petitioner drove the three ladies to a party. After a short time at the party, he proceeded to drive the three ladies home, passing by a florist shop which he owned en route. Bad feelings then developed between the petitioner and Miss Thomas, with the latter, the unemployed Miss Thomas, instructing the former as to how to run his florist shop. Heated words were exchanged between the petitioner and Miss Thomas culminating in the petitioner ordering the ladies out of his automobile one block from the home of Miss Thomas and Miss Brower (T 196), (T 51).

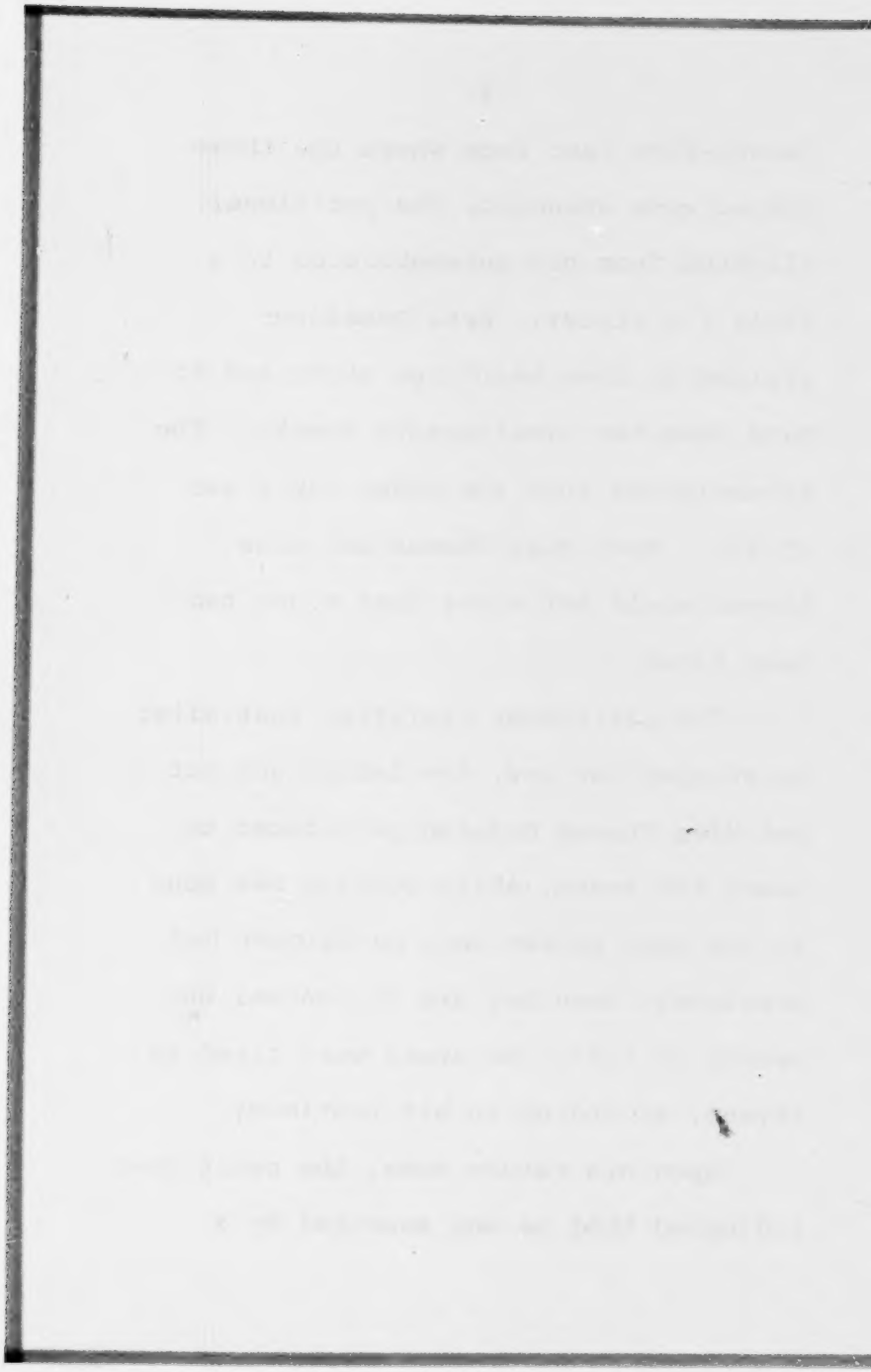
It was at this point that the alleged assault occurred. According to Mrs. Donaldson's testimony, with the car



twenty-five feet from where the three ladies were standing, the petitioner alighted from his automobile on to a dimly lit street. Mrs. Donaldson claimed to have heard two shots and to have seen two simultaneous sparks. She acknowledged that she never saw a gun (T 57). Both Miss Thomas and Miss Brower could not state that a gun had been fired.

The petitioner testified that after he stopped the car, the ladies got out and Miss Thomas ordered petitioner to leave the scene, while putting her hand in the same pocket book petitioner had previously seen her use to conceal her weapon (T 196). No shots were fired by anyone, according to his testimony.

Upon his return home, the petitioner indicated that he was searched by a



police officer. No gun was found in petitioner's car or on his person (T 198). Metropolitan Police Officer Tapscott testified that no shots had been reported by other citizens in the area in which the alleged occurrence took place (T 165).

At the conclusion of the government's case, petitioner moved for a mistrial (T 154). The Court denied the Motion for mistrial (T 154), although indicating its displeasure with various phases of the prosecution (T 149, 150).

After deliberating for some time and requesting additional instructions with respect to the count charging possession of a prohibited weapon with intent to use it unlawfully, the jury returned verdicts of guilty as to the simple assault and carrying a pistol

police officer. No gun was found in petitioner's car or on his person (T 198). Metropolitan Police Officer Tapscott testified that no shots had been reported by other citizens in the area in which the alleged occurrence took place (T 165).

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without a license counts and not guilty as to the possession of a prohibited weapon count.

A R G U M E N T

That the trial court erred in not granting petitioner's Motion for a mistrial where no less than twelve separate instances of gross prosecutorial misconduct infected that trial with such fundamental unfairness as to amount to a denial of procedural due process of law, as guaranteed to the petitioner by the Fifth Amendment to the United States Constitution.

Aside from the actors involved in this case there were no eyewitnesses to the event in question. Consequently at the trial level the credibility of each actor was critical. Unfortunately, we submit, the fundamental fairness of the trial and the impartiality of the

jury were infected by blatant and deliberate prosecutorial misconduct.

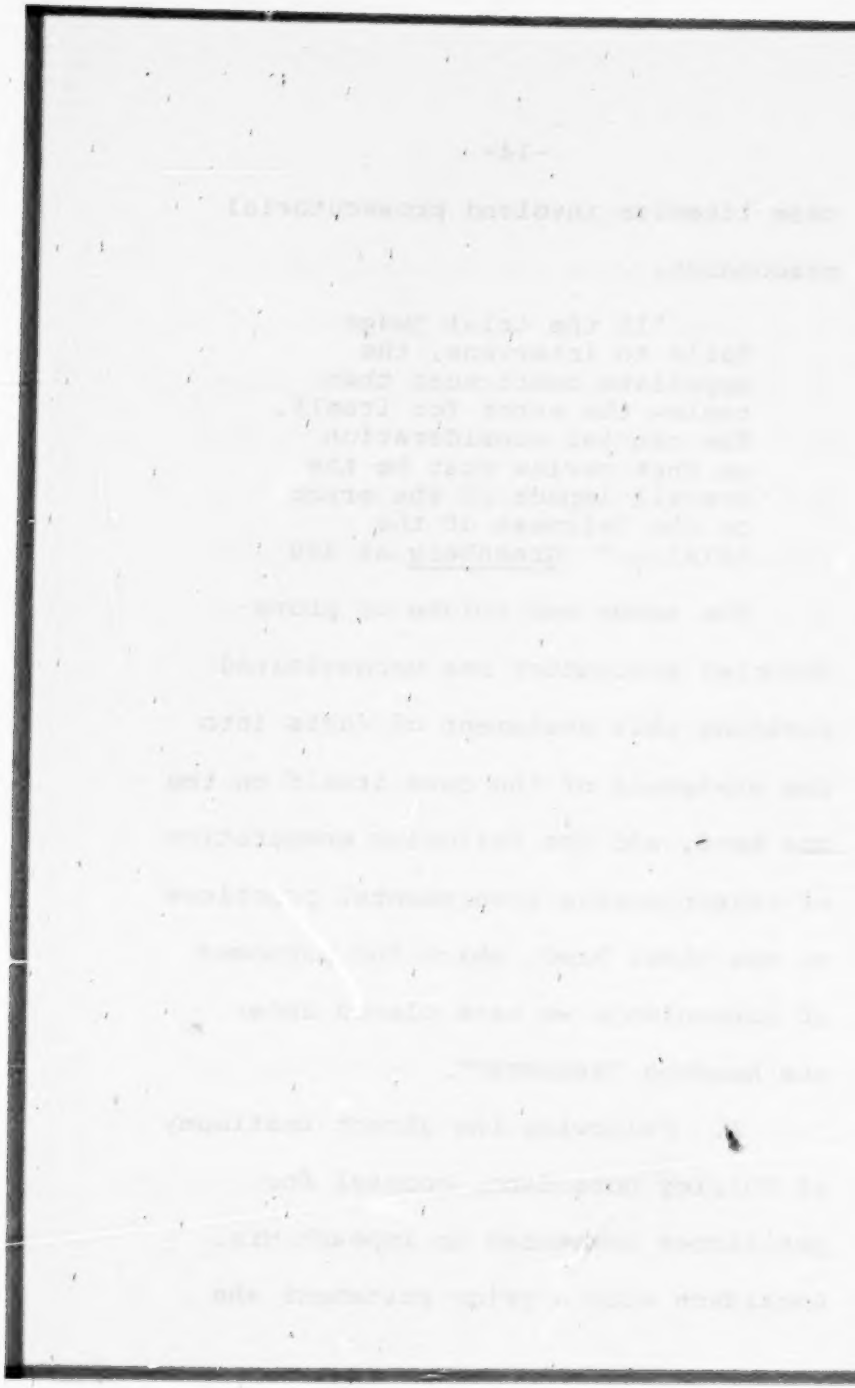
Were this a tort case it would be appropriate to apply the doctrine of Res Ipsa Loquitur. We submit that a reading of the trial transcript, voluminous as it is, would speak for itself. The prosecutor at the trial level committed such a multitude of prejudicial errors that to allow petitioner's conviction to stand would be a travesty of justice. Conceding, arguendo, that no single error is sufficient to warrant reversal, taken en toto their effect upon the jury can not be underestimated. We submit for the Court's consideration the following quote from Judge Bazelon's concurring opinion in the case of United States v. Greenberg, 280 F.2d 472, (1960). That

case likewise involved prosecutorial misconduct.

> "If the trial judge fails to intervene, the appellate court must then review the error for itself. The crucial consideration on that review must be the overall impact of the error on the fairness of the trial..." Greenberg at 480

The scope and volume of prosecutorial misconduct has necessitated dividing this statement of facts into the statement of the case itself on the one hand, and the following enumeration of objectionable governmental practices on the other hand, which for purposes of convenience we have placed under the heading "ARGUMENT".

A. Following the direct testimony of Shirley Donaldson, counsel for petitioner commenced to impeach Mrs. Donaldson with a prior statement she



had made to the police (T 61). In order to resolve an objection respecting this impeachment, the Court granted a recess to permit counsel to confer with the police officer and witnesses in the case (T 68). However, at this point, the prosecutor instructed the police officer not to speak with defense counsel or the defendant (T 69). As the prosecutor later acknowledged with candor, he "just merely responded, you know, not to talk with anyone in this case" (T 145). While the Court reprimanded him for it (T 69), and instructed the prosecutor to advise the police officer of petitioner's right to interview him through counsel (T 74, 75), the damage had already been done.

The United States Court of Appeals

for the District of Columbia Circuit held in Gregory v. United States, 369 F.2d 185, cert. denied 369 U.S. 865, (1969), that the "sporting theory of justice" must be avoided. Witnesses cannot be considered as the property of either the defense or prosecution, but should be made equally available. Of similar import are United States v. Voie, 435 F.2d 744, (7 Cir. 1970), Callahan v. United States, 371 F.2d 659, (9th Cir. 1967) and Coppolino v. Helpern, 266 F. Supp. 930 (S.D.N.Y. 1967).

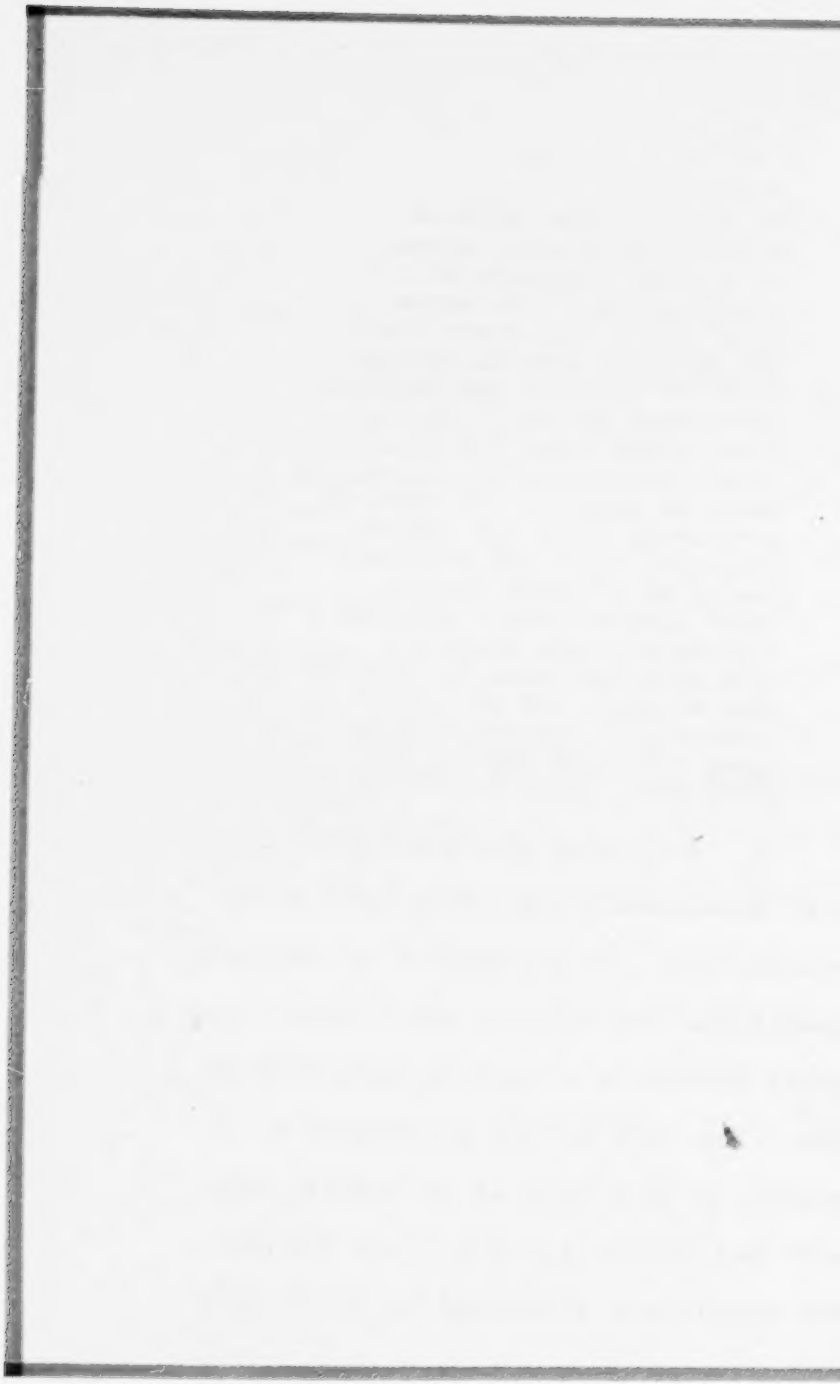
In view of the prosecutor's comment there is no way of knowing what might have been revealed had petitioner's trial counsel been afforded the opportunity to interview the witness, but there can be little doubt that

petitioner was prejudiced by the prosecutor's remarks, and sound policy reasons as well as the foregoing cases clearly required the trial court to have declared a mistrial of the case, giving fresh instructions to the witnesses and permitting an interview by the defense attorney of the witnesses. The trial court's failure to do this should be corrected by action of this Court. Otherwise, the fundamental fairness inherent in the rule of equal access will be dissipated if parties to a case become aware that the courts do not impose sanctions -- as the trial court here failed to do -- for violation of the rule.

> "We conclude that it would have been better procedure if the trial court had permitted the attorneys for the defense to hear directly from the witness Neal whether he would be willing

> to talk to the defense attorneys, either alone or in the presence of his attorney. We agree with the trial court that the witness had no obligation to talk to the defense attorneys at all. We further agree that the witness could condition his agreement to talk to the defense attorneys upon the understanding that his attorney would be present during such discussions. However, ultimately and finally, the decision must be that of the witness and not his attorney." United States v. Long 449 F.2d 288 at 296 (8th Cir. 1967).

B. Following the conclusion of Mrs. Donaldson's testimony upon cross examination, the prosecutor on redirect questioned the witness about Petitioner's trial counsel's attempted interview of her. The form of the prosecutor's questions were such as to suggest that both petitioner and his trial counsel had previously attempted to intimidate

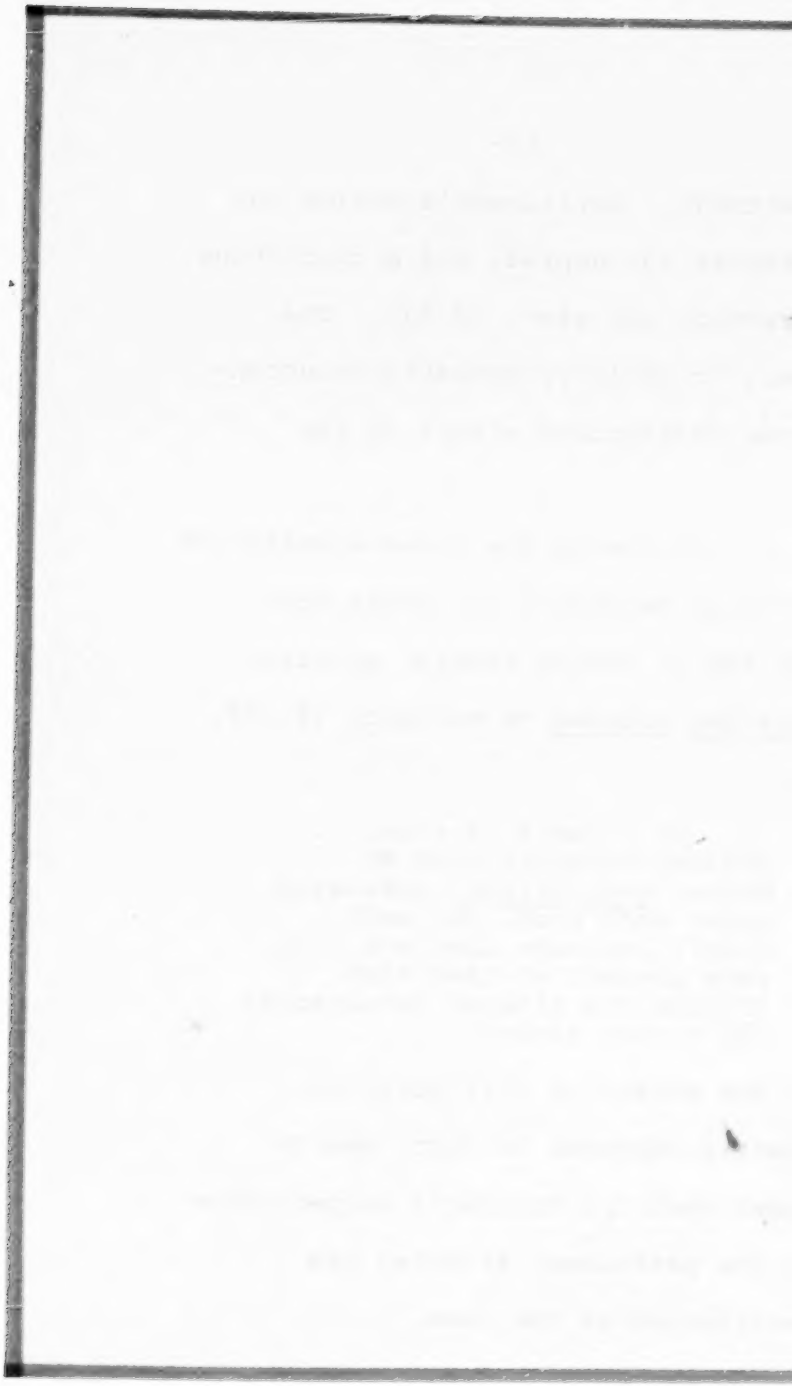


the witness. Petitioner's motion for a mistrial was denied, and a clarifying instruction was given (T 83). The latter, in reality, probably heightening the deleterious effect on the jury.

C. Following the cross-examination of Officer Tapscott, the prosecutor asked the following leading question of his own witness or redirect (T 139, 140).

> Q: "Isn't it true, Officer Tapscott that Mr. McRae, your friend, indicated under oath that, uh, well, didn't indicate that any guns were present at that time. (During the alleged occurrence) Isn't that right?"

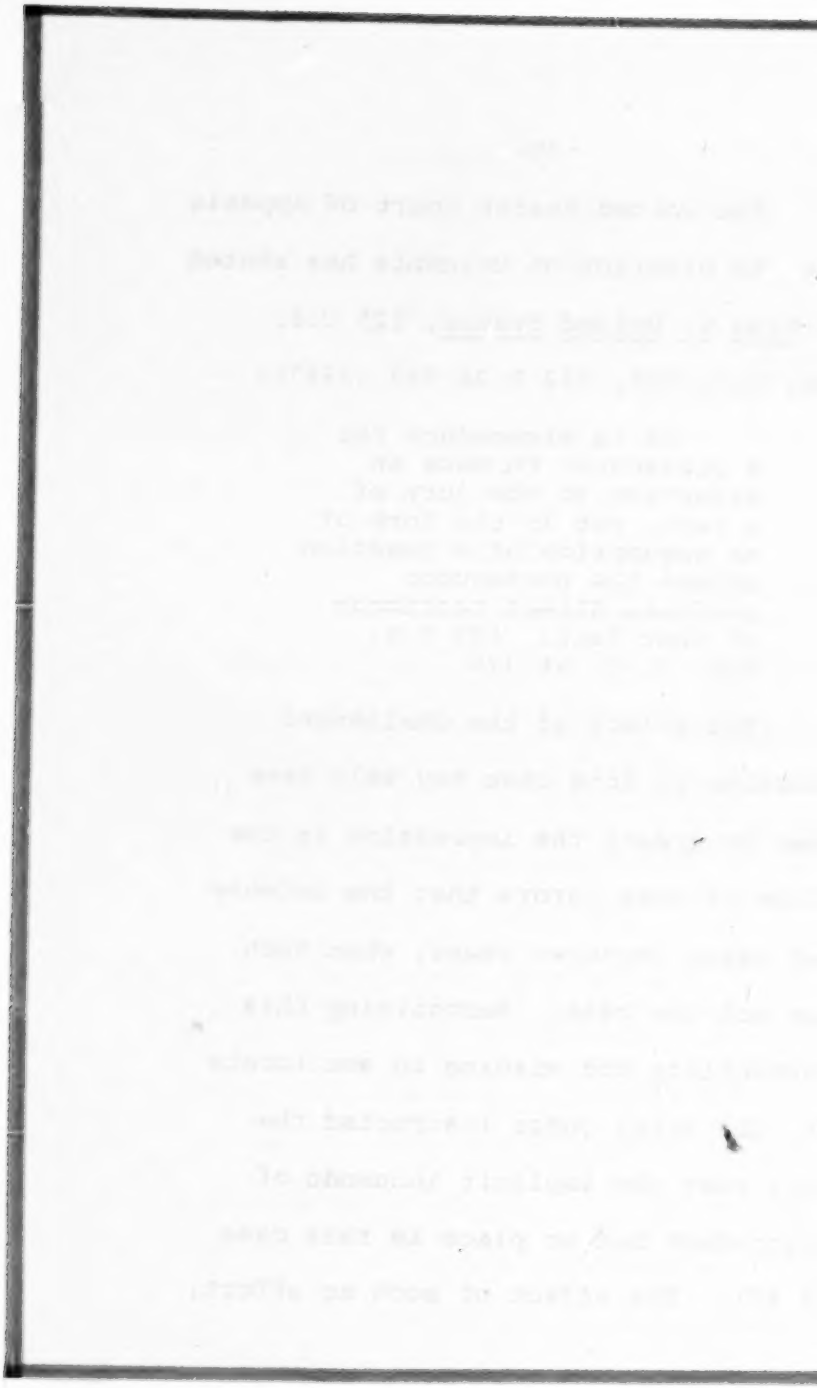
The effect of this question, blatantly improper in form, was to suggest that the Officer's acquaintance with the petitioner affected his investigation of the case.



The United States Court of Appeals for the District of Columbia has stated in King v. United States, 125 U.S. App. D.C. 318, 372 F.2d 383 (1967):

> It is misconduct for a prosecutor to make an assertion to the jury of a fact, put in the form of an assumption of a question unless the prosecutor proffers direct testimony of that fact. 125 U.S. App. D. C. at 329

The effect of the challenged question in this case may well have been to create the impression in the minds of some jurors that the defense had taken improper steps, when such was not the case. Recognizing this possibility and wishing to ameliorate it, the trial judge instructed the jury that the implicit innuendo of misconduct had no place in this case (T 87). The effect of such an effort,



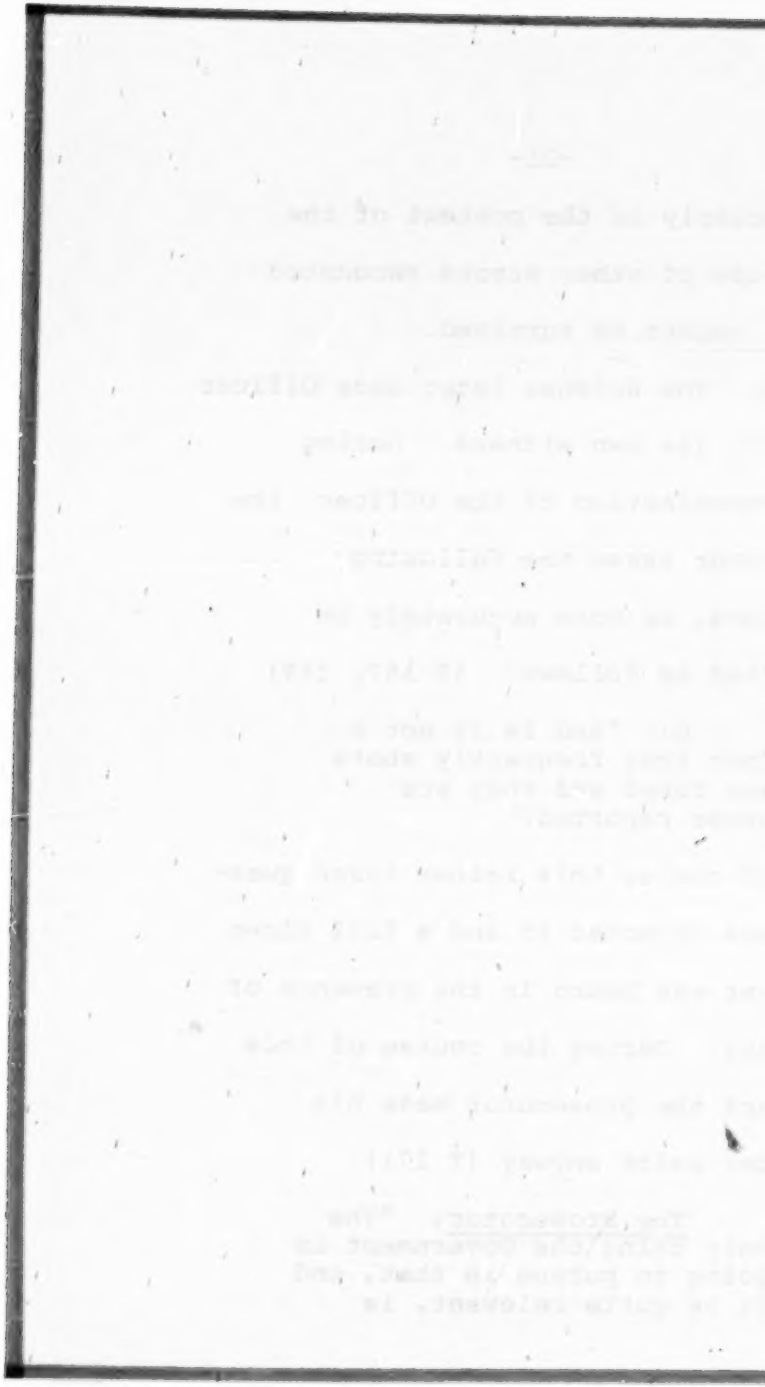
particularly in the context of the multitude of other errors recounted below, cannot be surmised.

D. The defense later made Officer Tapscott its own witness. During cross-examination of the Officer, the prosecutor asked the following questions, or more accurately he testified as follows: (T 167, 169)

> Q: "And is it not a fact that frequently shots are fired and they are never reported?"

Of course this rather inane question was objected to and a full blown argument was heard in the presence of the jury. During the course of this argument the prosecutor made his improper point anyway (T 171).

> The Prosecutor: "The only thing the Government is going to pursue is that, and it is quite relevant, is



> that all too often shots are heard in that area - the Fourth District area, that there have been shots, on the particular night, perhaps. And people are quite apathetic - even when they see someone being beaten. They don't call the police, they walk away. You see the logical import of counsel's questioning of witnesses is that even though shots were heard maybe there were no shots reported."

The prejudicial effect of this "testimony" by the prosecutor needs no amplification.

E. On cross-examination, the prosecutor attempted to show that petitioner, a part-time cab driver, had at one time violated hacking regulations by speaking with Miss Thomas when she was a passenger in his cab (T 207). Petitioner's trial counsel objected promptly to this wholly improper question, and the Court sustained the

objection, saying:

> "This is not the Hacking Board. I don't care what rules he violated in the Hacking Board." (T 208)

However, the Court implicitly denied a mistrial motion (T 209).

F. A few moments later, when questioning petitioner respecting the chemical weapon about which he earlier testified, the prosecutor cross-examined petitioner as follows:

> Q: She showed you this gun, and you showed her this mace?
>
> A: I showed her my mace before she showed me the gun. And this is not mace, it is a chemical.
>
> Q: How long have you had that?
>
> A: Maybe three or four years.
>
> Q: Have you ever used any guns besides that? (Emphasis supplied)

Mr. Finkelstein: Your Honor, I object.

The Court: Objection sustained. (T 215).

This gratuitous, double question could not but have left the impression that the chemical petitioner was describing was some type of gun or that he had improperly possessed a gun on a prior occasion. Where a charge of carrying a pistol without a license is involved, any inference which the jury might draw to the effect that petitioner had a prior history of improper use of weapons is most damaging.

G. Following this, the prosecutor asked whether petitioner's testimony was molded by his prior experience on the police force, a position he had left eight years earlier (T 220). Petitioner's counsel again objected

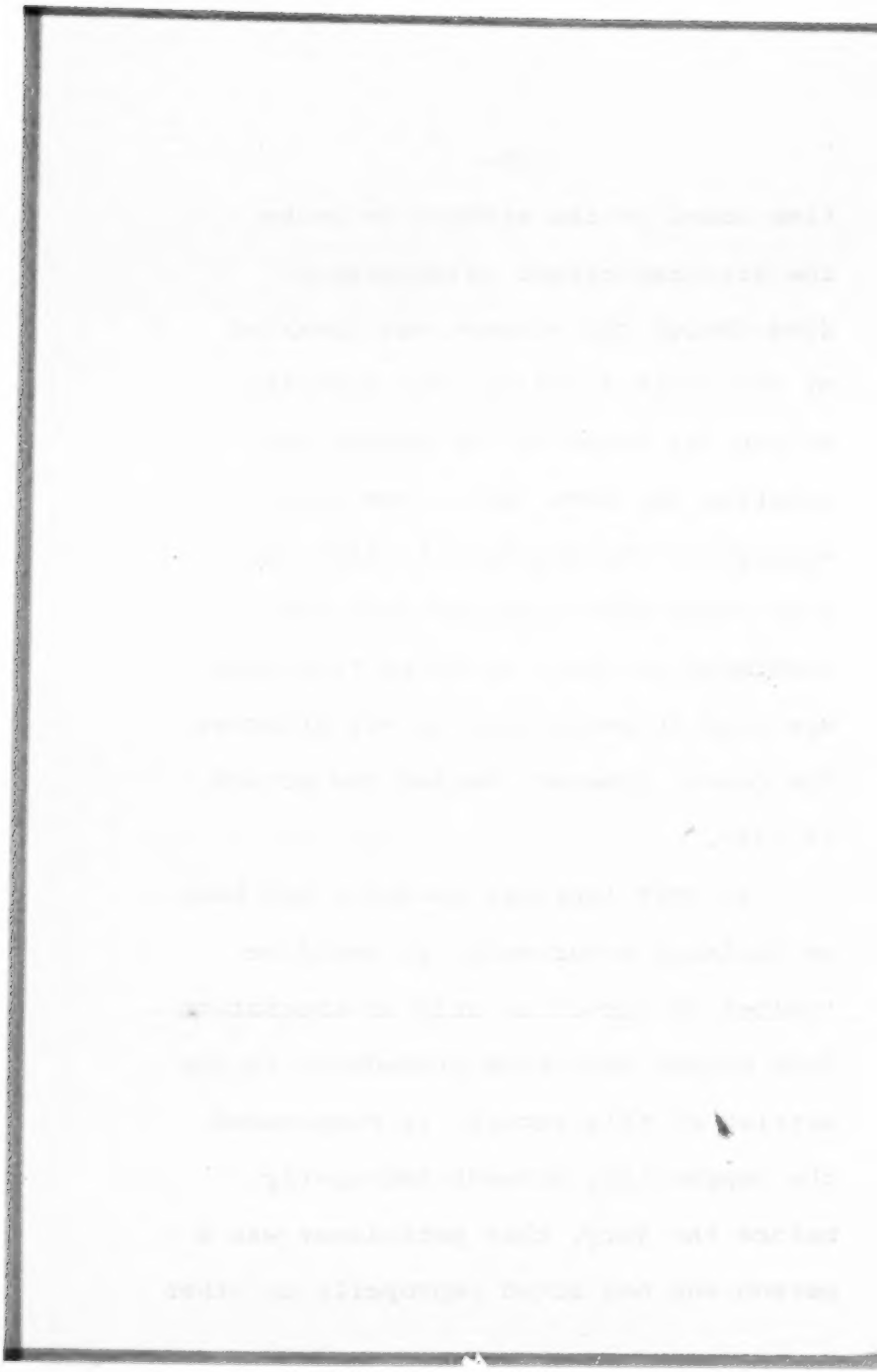
that the question was without foundation and the Court sustained the objection. The Court:

> "You can't ask questions for which you have no basis. (T 221)

H. Following a discussion of the circumstances surrounding petitioner's arrest, including his voluntary surrender, another controversy developed respecting the prosecutor's trial technique. The prosecutor attempted to interrogate the petitioner respecting conversations he had had with his counsel (T 231). The prosecutor asked the petitioner whether he had ever told his attorney that Miss Thomas showed him a gun in Founda's Club on the evening in question. The Court immediately sustained an objection (T 232). Petitioner renewed his motion for a mistrial, this

time based on the attempt to probe the attorney-client relationship. Even though the attempt was thwarted by the Court's ruling, the mistrial motion was based on the effect the question may have had on the jury, especially the possibility that the jury might have inferred that the testimony in Court differed from what was told by petitioner to his attorney. The Court, however, denied the motion (T 234).

If this improper question had been an isolated occurrence, it could be treated on appeal as only an aberration from proper courtroom procedure; in the setting of this record, it compounded the impression, already improperly before the jury, that petitioner was a person who had acted improperly on other

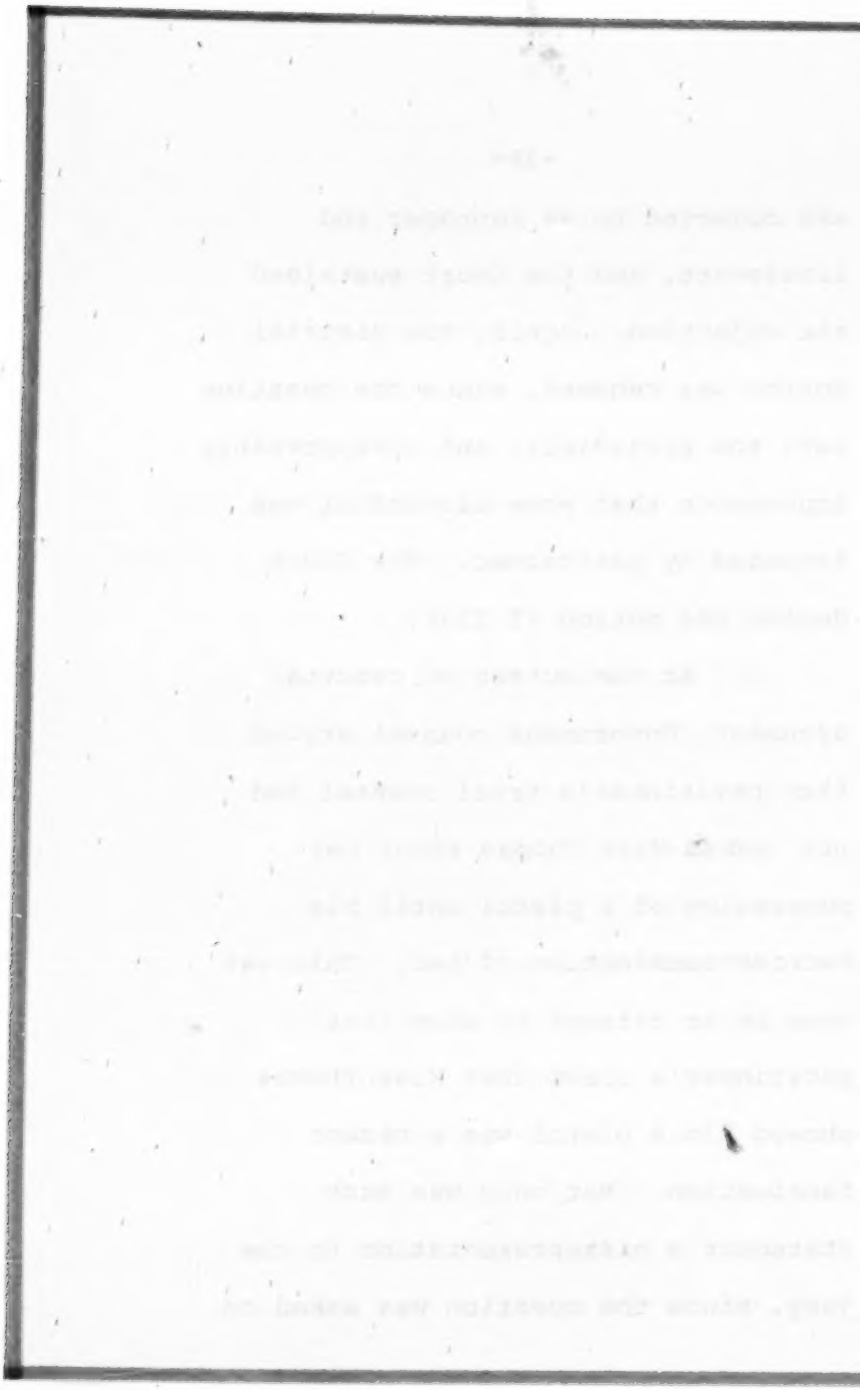


occasions. Aware of the ever-increasing quantity of prejudicial material before the jury, petitioner's counsel moved for a mistrial. Perhaps giving undue weight to the time and energy already expended in trial of the case, the Court denied the motion (T 252), but gave a cautionary instruction to the jury. Petitioner submits that, in the context of this case, the Court should have taken the more forceful step and granted the mistrial.

I. Officer Tapscott was called to the stand once again, this time as a rebuttal witness for the Government. At the conclusion of his testimony, he was asked by the prosecutor whether he was advised by petitioner of his "designs" on the three women involved in this incident (T 252). This question

was objected to as improper and irrelevant, and the Court sustained the objection. Again, the mistrial motion was renewed, since the question left the prejudicial and unsupportable impression that some misconduct was intended by petitioner. The Court denied the motion (T 253).

J. At the outset of rebuttal argument, Government counsel stated that petitioner's trial counsel had not asked Miss Thomas about her possession of a pistol until his recross-examination of her. This was done in an attempt to show that petitioner's claim that Miss Thomas showed him a pistol was a recent fabrication. Not only was such statement a misrepresentation to the jury, since the question was asked on



cross-examination and not on a hastily contrived re-cross, but by accusing in this manner he attempted to reflect upon what the client, petitioner, had told his trial attorney. The learned trial judge expressed concern over the prosecutor's tactics at that point, although refusing to grant a motion for a mistrial.

> The Court: Mr. Wagner, the Court would ask you to refrain from doing that. That is not proper. You know there is a privilege existing between counsel and his client.
>
> The Prosecutor: Well, Your Honor.
>
> The Court: Let me talk. No lawyer talks about what a client has said to his lawyer. The prosecutor has got the right to make an argument as strongly and vigorously as is possible. But they have got to be fair arguments. You don't talk about a confidential relationship between attorney and client...You can't argue statements that are not in evidence.

* * * *

> You don't make these kinds of arguments. It is improper argument, and I am getting impatient with it, and I don't usually get impatient. I am getting impatient with this kind of argument. It is not proper (T 278).

K. A final aspect of the Government's rebuttal argument was impeachment of the Government's own witness, Officer Tapscott. The prosecutor suggested that the Government's failure to offer a gun into evidence was attributable to the police officer's intentional neglect of the case, which in turn was ascribed to his friendship with petitioner; a wholly unfounded and improper allegation.

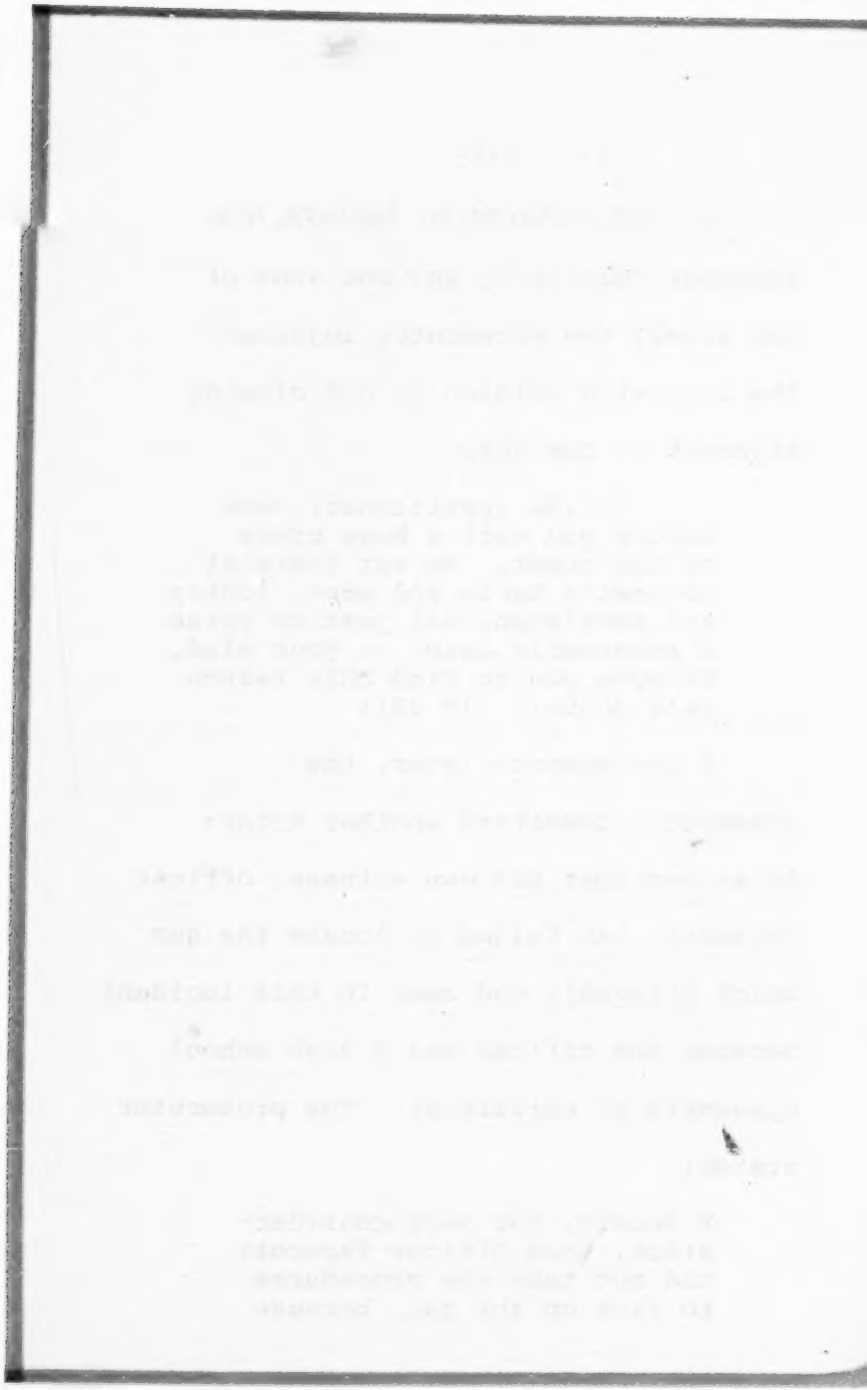
> "Officer Tapscott did not take the procedures to pick up the gun, because Mr. McRae was his friend." (T 283)

L. Not wishing to isolate his improper remarks to any one area of the trial, the prosecutor injected the following opinion in his closing argument to the jury.

> "...he [petitioner] came before you with a huge cross on his chest. He sat there at counsel's table and wept, ladies and gentlemen, all just to raise a reasonable doubt in your mind, to move you to find this reasonable doubt." (T 281)

A few moments later, the prosecutor committed another error: he argued that his own witness, Officer Tapscott, had failed to locate the gun which allegedly had been in this incident because the officer was a high school classmate of petitioner. The prosecutor stated:

> I submit, for your consideration, that Officer Tapscott did not take the procedures to pick up the gun, because

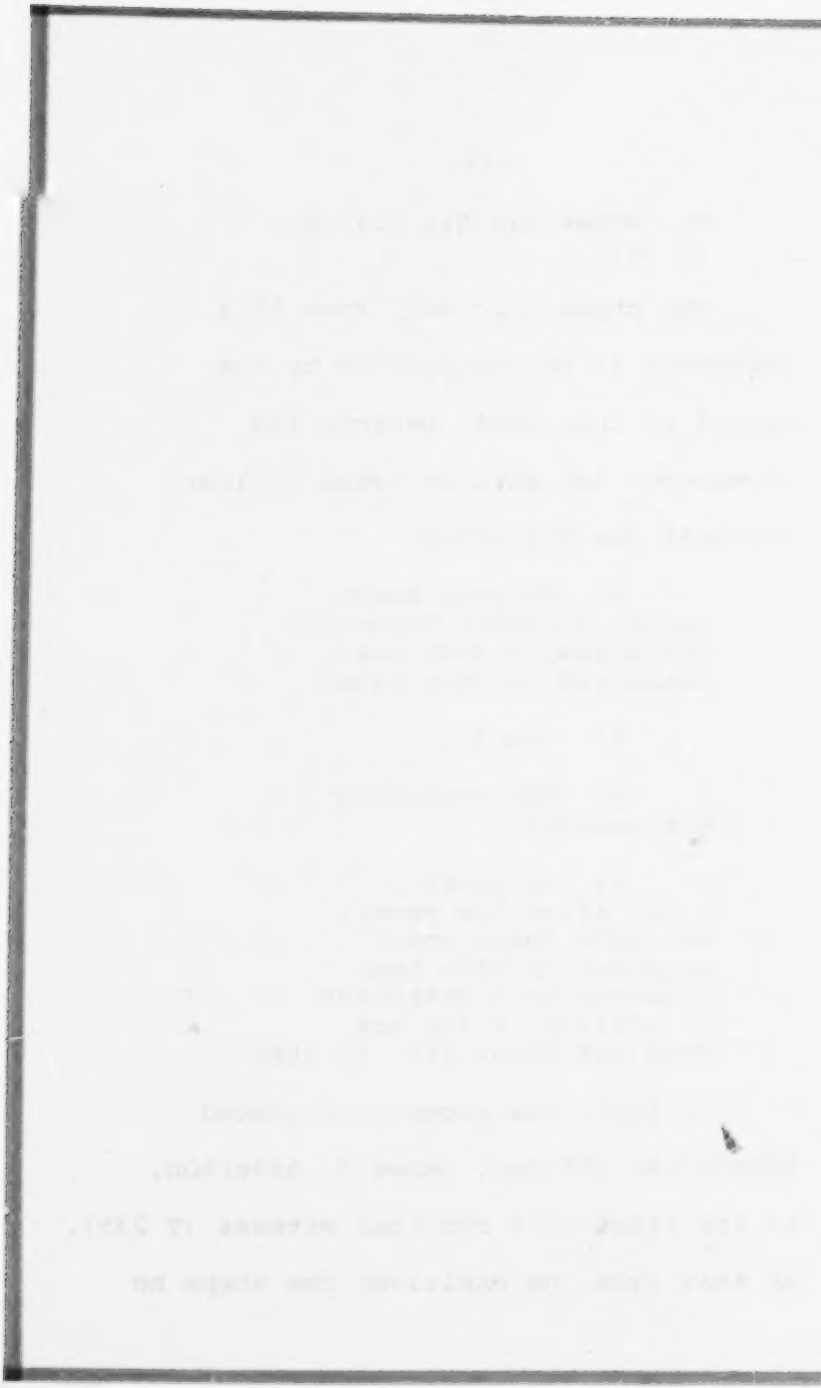


Mr. McRae was his friend.
(T 283)

The prosecutor well knew this inference to be unsupported by the record in this case, because the prosecutor had earlier asked Officer Tapscott the following:

> Q: To your knowledge, Sergeant Tapscott, has a search ever been conducted in this case?
>
> A: Yes sir.
>
> Q: Who conducted the search?
>
> A: Originally, right after the report was made there was supposed to have been a search by a detective or officer, I did not find out about it. (T 106)

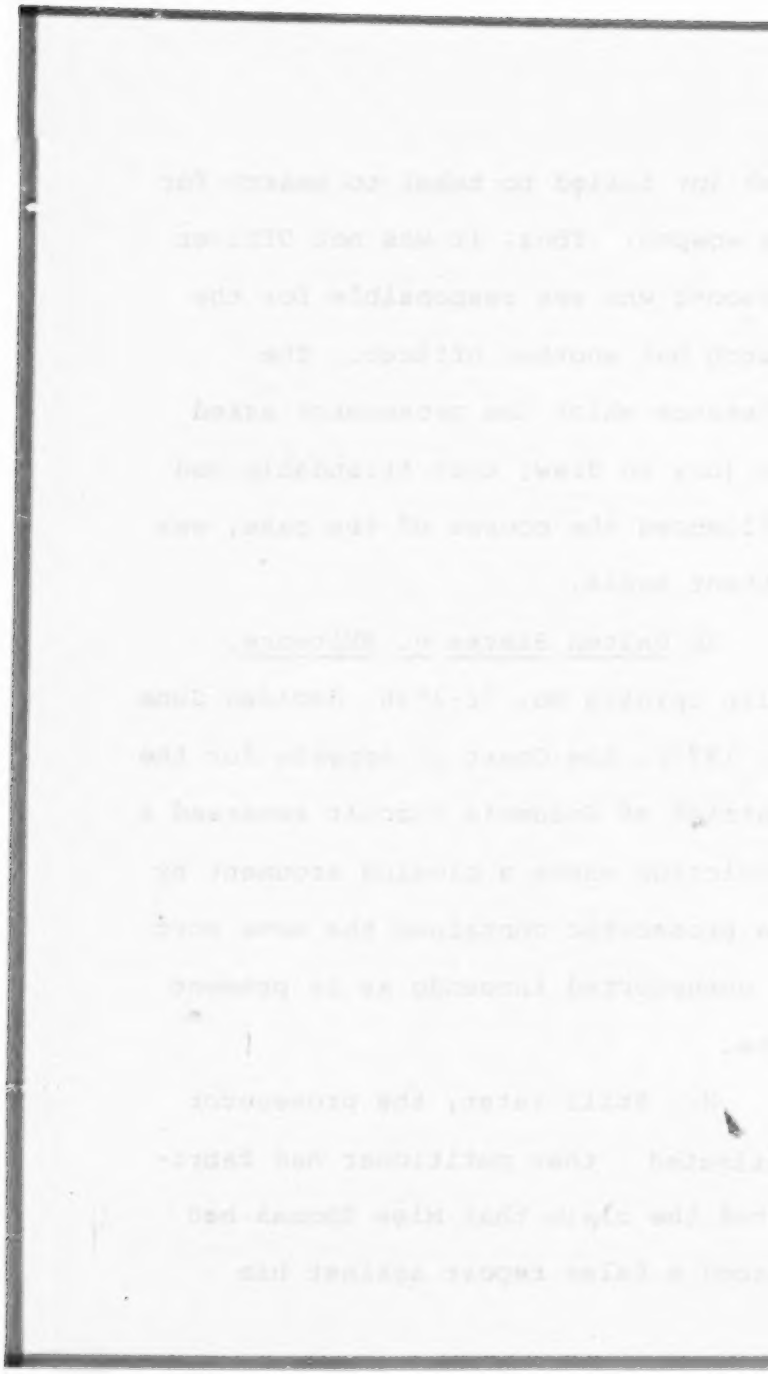
In fact, the prosecutor placed this other officer, James O. Anderson, on the stand as a rebuttal witness (T 235). At that time, he explained the steps he



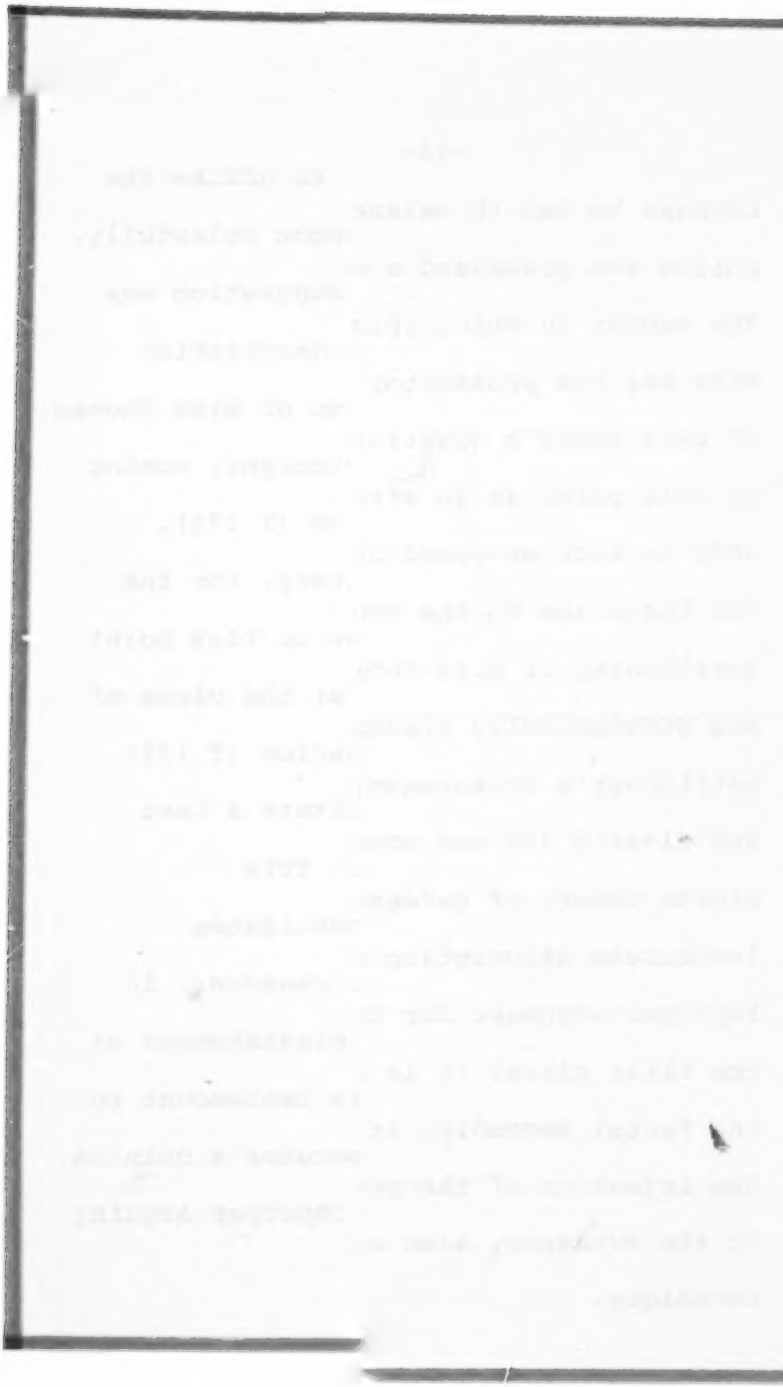
took (or failed to take) to search for the weapon. Thus, it was not Officer Tapscott who was responsible for the search but another officer. The inference which the prosecutor asked the jury to draw, that friendship had influenced the course of the case, was without basis.

In United States v. Whitmore, (slip opinion No. 72-1530, decided June 29, 1973), the Court of Appeals for the District of Columbia Circuit reversed a conviction where a closing argument by the prosecutor contained the same sort of unsupported innuendo as is present here.

M. Still later, the prosecutor intimated that petitioner had fabricated the claim that Miss Thomas had placed a false report against him



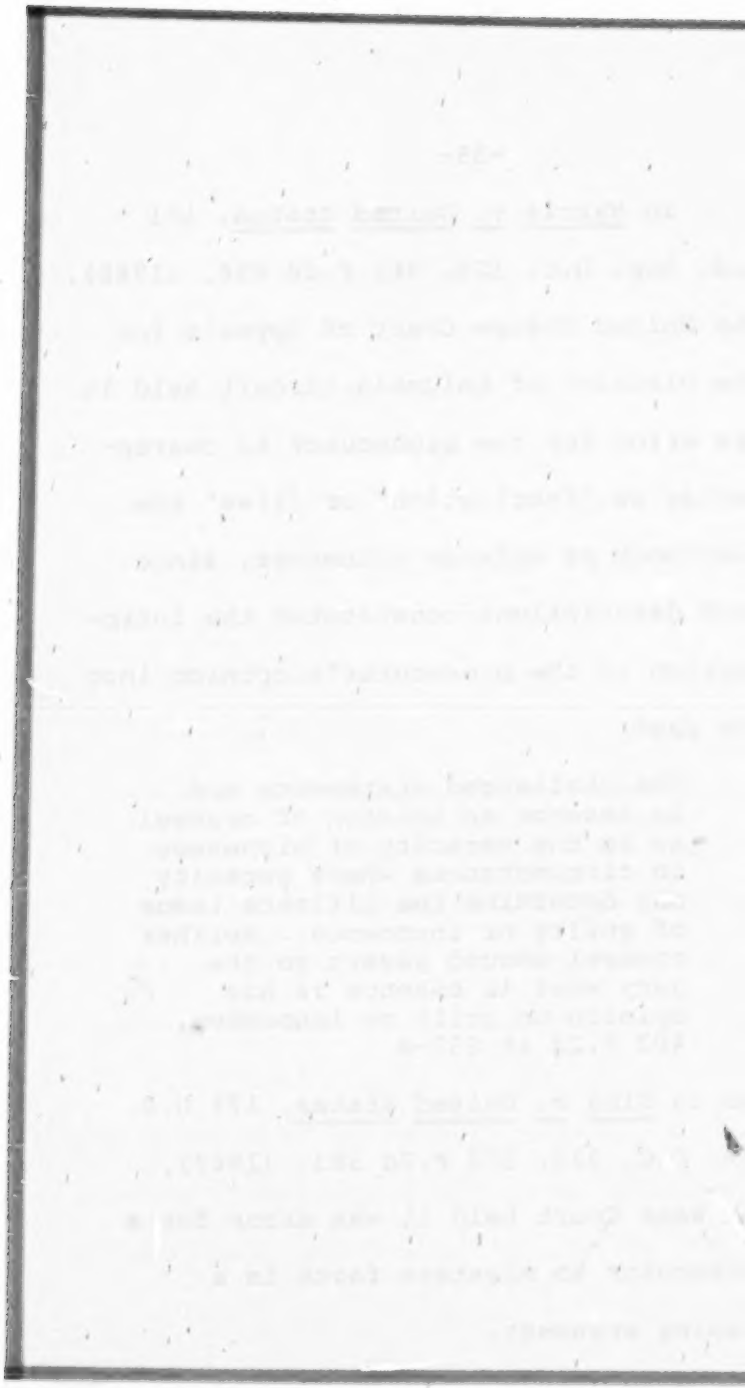
because he had threatened to advise the police she possessed a weapon unlawfully. The manner in which this suggestion was made was the prosecutor's description of petitioner's questioning of Miss Thomas on this point as an afterthought, coming only on recross-examination (T 276). The facts are to the contrary, for the questioning of Miss Thomas on this point was strategically placed at the close of petitioner's cross-examination (T 126) and clearly did not constitute a last minute theory of defense. This inaccurate description constitutes improper argument for two reasons: in the first place, it is a misstatement of the facts; secondly, it is tantamount to the injection of the prosecutor's opinion of the evidence, also an improper arguing technique.



In Harris v. United States, 131 U.S. App. D.C. 105, 402 F.2d 656, (1968), the United States Court of Appeals for the District of Columbia Circuit held it was error for the prosecutor to characterize as "fabrication" or "lies" the testimony of defense witnesses, since such descriptions constituted the introduction of the prosecutor's opinion into the case:

> The challenged statements are in essence an opinion of counsel as to the veracity of witnesses in circumstances where veracity may determine the ultimate issue of guilty or innocence...Neither counsel should assert to the jury what in essence is his opinion on guilt or innocence. 402 F.2d at 657-8

And in King v. United States, 125 U.S. App. D.C. 313, 372 F.2d 383, (1967), the same Court held it was error for a prosecutor to misstate facts in a closing argument.

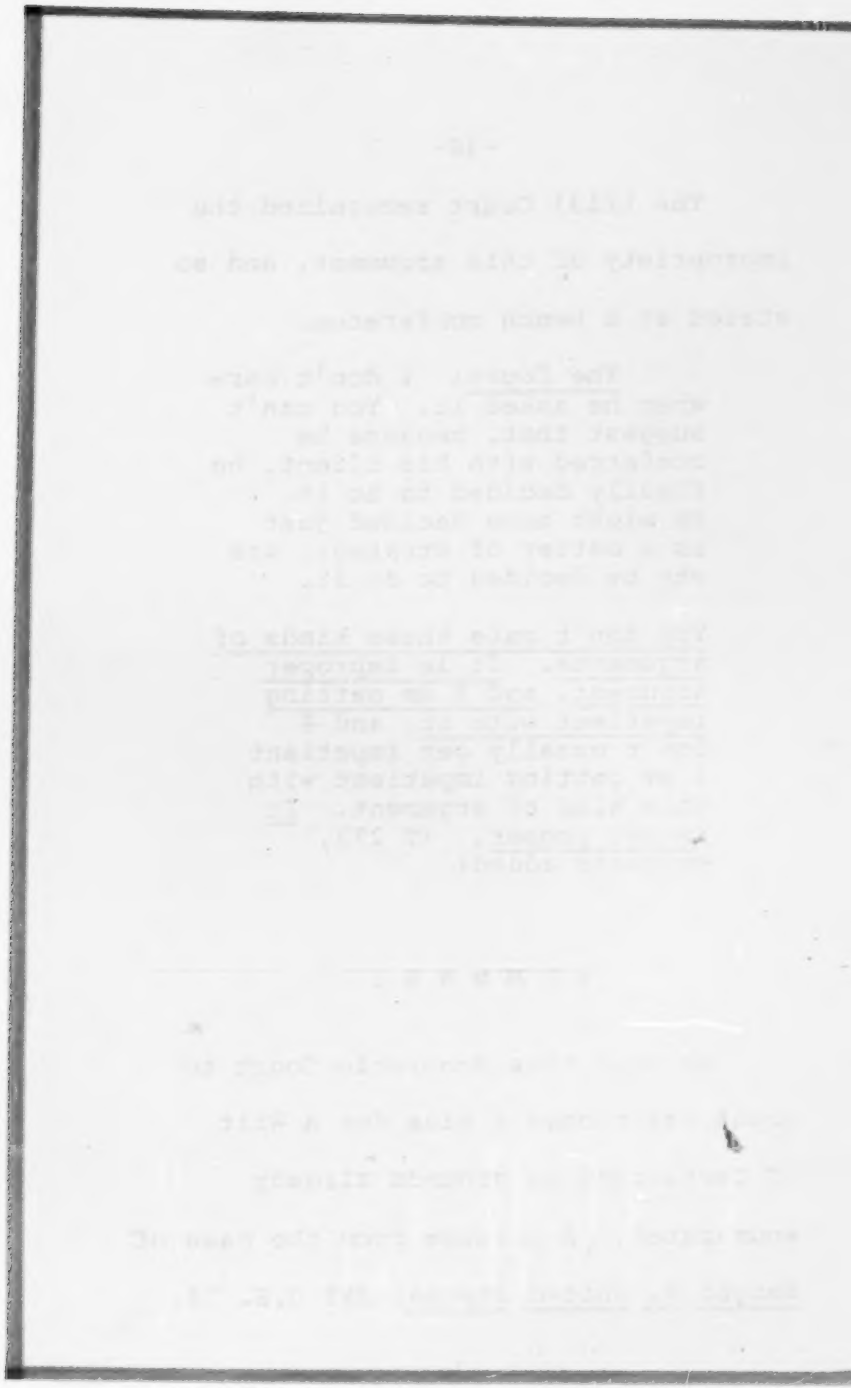


The trial Court recognized the impropriety of this argument, and so stated at a bench conference.

> The Court: I don't care when he asked it. You can't suggest that, because he conferred with his client, he finally decided to do it. He might have decided just as a matter of strategy, was why he decided to do it.
>
> You don't make these kinds of arguments. It is improper argument, and I am getting impatient with it, and I don't usually get impatient I am getting impatient with this kind of argument. It is not proper. (T 273, emphasis added)

S U M M A R Y

We urge this Honorable Court to grant petitioner's plea for a Writ of Certiorari on grounds already enumerated. A passage from the case of Berger v. United States, 295 U.S. 78,



(1934) seems particularly appropriate.

> "That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner... It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct. The trial judge, it is true, sustained

objections to some of the the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for a stern rebuke and repressive measures and, perhaps, if those were not successful, for the granting of a mistrial. it is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia
Court of Appeals

FILED FEB 28 1974
Alexander L. Stevas
Clerk

RECEIVED MAR - 1 1974

No. 7129 JANUARY TERM, 1974

THOMAS J. McRAE, Appellant,

v. 60660-72-B-C

UNITED STATES, Appellee.

Appeal from the Superior Court of the District of Columbia, Criminal Division.

BEFORE: Kelly, Fickling and Pair, Associate Judges.

J U D G M E N T

Appellant was convicted by a jury of simple assault (D.C. Code 1973, § 22-504) and of carrying a pistol without a license (D.C. Code 1973, § 22-3204). It is urged on appeal that a series of prosecutorial errors amounted to misconduct so prejudicial as to require a new trial. Specifically, appellant claims that the prosecutor (1) instructed the witnesses not to speak with defense counsel; (2) made improper and unfounded suggestions that the defense was tampering with the witnesses; (3) asked speculative questions for purposes of innuendo rather than to elicit a response; (4) indulged in improper questions to appellant by use of a double question and irrelevant matters; (5) improperly attempted to probe the attorney-client relationship, and (6) made an improper closing argument by incorrectly recounting the testimony and by injecting therein his personal opinion. The numerous mistrial motions made by counsel were denied, as well as a subsequent motion for new trial.

After careful review of the record and briefs, and after hearing oral argument, the court is of the opinion that appellant's alleged errors do not rise to the level of substantial prejudice necessitating reversal. Smith v. United States, D.C.App., ____ A.2d ____ (No. 7184, Feb. 21, 1974).

As to the first claim of error, while the circumstances as evidenced on the record were somewhat equivocal, the trial court admonished the prosecutor for his conduct and, unlike the situation in Gregory v.

United States, 125 U.S.App.D.C. 140, 369 F.2d 185 (1966), ordered that counsel have full access to prosecution witnesses. Thus, the grant of a mistrial was not required. The second, third, fourth and fifth claims of error are insubstantial. In each instance counsel's objection was sustained and on several occasions either a clarifying instruction was given or the jury was instructed to disregard the questions to which objections had been made. In no instance was a mistrial warranted. As to the final claim of error, the trial court did at one point reprimand the prosecutor for making an improper argument; however, the prosecutor's remarks, if improper, were not so prejudicial as to warrant reversal. Harris v. United States, 131 U.S.App.D.C. 105, 402 F.2d 656 (1968). In addition, it is the court's judgment that, just as each of the claimed errors did not separately require a mistrial, the combined effect of the alleged errors did not establish a pattern of prosecutorial misconduct which could be said to have denied appellant a fair trial.

Accordingly, it is this 28th day of February, 1974,

ORDERED and ADJUDGED that the judgment of the trial court is hereby affirmed.

PER CURIAM.

FOR THE COURT:

Alexander L. Stevas

ALEXANDER L. STEVAS, CLERK.

Copies to:

Honorable Luke C. Moore
Judge, Superior Court of the District of Columbia.

Clerk, Superior Court of the District of Columbia.

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Assistant United States Attorney
Attorney for Appellee.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-7

THOMAS J. McRAE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecutor improperly instructed a government witness not to speak with petitioner's attorney; that the prosecutor engaged in improper questioning of witnesses; and that the prosecutor's closing argument was improper.

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted of simple assault, in violation of 22 D.C. Code 504, and of carrying a pistol without a license, in violation of 22 D.C. Code 3204.[1] Petitioner was sentenced to concurrent terms

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[1]The information also charged petitioner with possession of a prohibited weapon in violation of 22 D.C. Code 3214(b), but the jury acquitted him on that count.

of 180 days on each count. The court suspended execution of the sentence and imposed a one-year term of probation. The court of appeals affirmed *per curiam* in an unreported judgment (Pet. App.).

Briefly, the evidence showed that petitioner was driving three women home following an evening of socializing (Tr. 32, 98, 101). An argument ensued and petitioner ordered the women to leave his car (Tr. 52-53). Shortly after they did so, petitioner left the car and extended his arm toward the group. The women claimed to have seen two successive orange sparks and to have heard the sound of two shots from a gun (Tr. 35-36, 103). They reported the incident to the police (Tr. 37, 53).

1. Petitioner's counsel attempted to impeach one of the complaining witnesses, Shirley Donaldson, by using an alleged prior inconsistent statement contained in a police department form (Tr. 61-63). The government objected because it was not possible to determine which part of the statement of facts on the police form could be ascribed to the particular witness (Tr. 63-64). The court sustained the objection (Tr. 67)[2] and ordered a recess to allow defense counsel and the prosecutor to seek clarification from the investigating officer who was alleged to have been present when the complainants gave their statements to the police (Tr. 67-68).

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[2]The court stated that it "would have some question about using this document to attempt to impeach her, unless there is some showing that the impeaching part of it is the statement that she gave. If this is a composite of what other witnesses, and the police gave, it would seem to me that this witness cannot be held accountable for that * * * " (Tr. 65).

During the recess, the investigating police officer, Detective Sergeant Tapscott, known to the prosecutor as a close friend of petitioner, was instructed by the prosecutor not to speak with defense counsel except in the presence of the prosecutor (Tr. 69-70).[3] However, this instruction was immediately countermanded by the trial court, which ordered that petitioner's access to Tapscott should not be circumscribed in any manner (Tr. 73-74). The defense later called Tapscott as its own witness (Tr. 165). It is thus clear that the prosecutor's desire to insulate Tapscott from the defense did not effect his ability or apparent desire to cooperate with petitioner. Accordingly, we do not perceive how petitioner was prejudiced by the short-lived directive of the prosecutor.

Gregory v. *United States*, 369 F. 2d 185 (C.A.D.C.), certiorari denied, 396 U.S. 865, relied on by petitioner, is inapposite. In *Gregory*, defense counsel was denied access to the government's witnesses before trial because the prosecutor had advised them against talking to anyone unless he was present. The court ruled that witnesses belong to neither prosecution nor defense, which should both have equal access to witnesses. There is no allegation here that Tapscott was not available to the defense prior to trial or that he was a hostile witness unwilling to talk to the defense. Indeed, his long friendship with petitioner, his many conversations with petitioner even before his arrest (Tr. 139), and his later testimony as a defense witness, would make such an allegation difficult

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[3]Tapscott had a close friendship with petitioner whom he had known since their school days together in 1956 or 1957 (Tr. 136-137). The prosecutor was aware that Tapscott had delayed arresting petitioner for almost six days before "inviting" petitioner to present himself at the station to be arrested (Tr. 136-137) and that Tapscott had arranged for an interview with an Assistant United States Attorney in an effort to have the case against petitioner dismissed before trial (Tr. 86).

to sustain. Moreover, while the prosecutor sought to restrict defense counsel's access to Tapscott during the recess—for what appear to have been arguably legitimate reasons in the circumstances, despite the language of *Gregory*—the court immediately countermanded the prosecutor's instructions and made Tapscott available to speak with defense counsel out of the presence of the prosecutor. Petitioner has failed to demonstrate any prejudice.

2. Petitioner contends that the prosecutor engaged in improper cross-examination on several occasions and that this conduct required the court to declare a mistrial. These claims were termed "insubstantial" by the court of appeals, which correctly stated: "In each instance counsel's objection was sustained and on several occasions either a clarifying instruction was given or the jury was instructed to disregard the questions to which objections had been made. In no instance was a mistrial warranted" (Pet. App. 2).[4]

3. Finally, petitioner contends that the prosecutor engaged in improper rebuttal argument in a number of respects (Pet. 28-36). Without responding specifically to each alleged impropriety,[5] we submit that on the record in this

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[4]The court's comments were also directed at petitioner's contention that the prosecutor sought improperly to probe the attorney-client privilege. We rely on the court's conclusion in that regard.

[5]To the extent that these allegations relate to the prosecutor's argument regarding the conduct of Sergeant Tapscott (Pet. 30-33), stronger inferences than mere failure to follow proper procedures could have been drawn. After all, Tapscott, a long-time friend of petitioner (see note 3, *supra*), exhibited extreme reluctance as a prosecution witness to incriminate petitioner and ready eagerness as a defense witness to exonerate him. See, *e.g.*, Tr. 130-132, 136-138, 165-168. The prosecutor's argument regarding failure to follow proper procedures, far from constituting error, was most charitable in the circumstances.

case, the court of appeals correctly concluded that "the prosecutor's remarks, if improper, were not so prejudicial as to warrant reversal. * * * [T]he combined effect of the alleged errors did not establish a pattern of prosecutorial misconduct which could be said to have denied appellant a fair trial" (Pet. App. 2). As this Court has recently reminded:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, * * * like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. * * * [A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations. [*Donnelly* v. *DeChristoforo,* No. 72-1570, decided May 13, 1974, slip op., pp. 9-10.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.